



## 38 CFR Parts 3 and 21

RIN 2900-AP67

### Apportionments

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Proposed rule.

**SUMMARY:** The Department of Veterans Affairs (VA) proposes to amend its regulations to limit the circumstances in which benefits will be apportioned and to stop apportioning certain benefits. Currently, in limited situations, VA may pay a portion of a VA beneficiary's monetary benefits directly to the beneficiary's dependents. This is referred to as apportionment of benefits. Most claims for apportionment involve complex issues of family law, issues that are best suited to the expertise and authority of state courts. VA claims adjudicators have limited ability to analyze these complex and fact-intensive claims, to include both technical expertise as well as an ability to compel participation in necessary accounting measures. When VA awards apportionments, decisions rendered can disturb state court support awards, requiring a state court to expend additional resources to revisit a prior determination. Finally, due to their intricacy, a significant amount of information is needed to properly adjudicate apportionment claims. While this information is typically already available to state courts, VA must attempt to gather this information from the VA beneficiary and beneficiary's dependent, which is unavoidably a time-consuming process and often cannot result in a comprehensive evidentiary picture. The additional time and effort needed to gather this information increases VA workloads and results in the potential for delays of all VA claims processes, to include

apportionment awards. Because VA apportionment awards often conflict with the awards of better-situated state family courts and because VA lacks the authority and expertise to make fully-informed, accurate, and economically appropriate awards, VA is proposing to amend its regulations to discontinue making apportionment awards in most circumstances and to stop apportioning certain benefits.

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Written comments may be submitted through [www.Regulations.gov](http://www.Regulations.gov). Comments should indicate that they are submitted in response to “RIN 2900-AP67– Apportionments”. Comments received will be available at [regulations.gov](http://regulations.gov) for public viewing, inspection or copies.

**FOR FURTHER INFORMATION CONTACT:** Korrie Shivers, Policy Analyst, Part 3 Regulations & Forms Staff (211D), Compensation Service (21C), Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 461-9700. (This is not a toll-free telephone number.)

**SUPPLEMENTARY INFORMATION:**

General

VA proposes to discontinue awarding apportionments of the compensation and pension benefits of veterans and surviving spouses in most circumstances by removing most of its apportionment-specific regulations and amending other

regulations that have apportionment provisions. VA intends to continue making apportionment awards where a veteran or surviving spouse is incarcerated or where an incompetent veteran, who does not have a fiduciary, is institutionalized at government expense, without regard to financial contributions to the claimant. VA does not intend to discontinue as a result of this rulemaking any apportionments currently being paid.

#### Apportionment Authority

Congress has provided VA broad discretionary authority under several statutes to pay apportionments out of a VA beneficiary's monetary benefits. In 38 U.S.C. 5307, Apportionment of benefits, Congress provided that VA may apportion compensation and pension benefits, including dependency and indemnity compensation (DIC) and rehabilitation subsistence allowances paid under 38 U.S.C. Chapter 31. This authority was at the discretion of the Secretary of Veterans Affairs. In 38 U.S.C. 5313(b)(1), Limitation on payment of compensation and dependency and indemnity compensation to persons incarcerated for conviction of a felony, Congress provided that the Secretary may apportion benefits. Similarly, in 38 U.S.C. 5502(d), Payment to and supervision of fiduciaries, and 38 U.S.C. 5503(a)(2), Hospitalized veterans and estates of incompetent institutionalized veterans, Congress provided that VA may apportion benefits. Notably, each apportionment authority in title 38 of the United States Code is permissive, but not required, as shown by the use of the word "may" or the phrase "may be apportioned as prescribed by the Secretary".

The statutory authority shows that Congress has given VA significant discretion on whether to apportion VA benefits. After reviewing the apportionment procedures and the impact of apportionment on veterans and

surviving spouses, VA has determined that some types of its apportionments undermine the processes established in state courts for distributing resources when an individual is not contributing to the support of his or her dependents. When viewed alongside the significant employee work-hours VA expends to process these requests, VA proposes to exercise the discretionary authority Congress gave it by discontinuing awarding new apportionments in most situations.

### Current Procedure

When VA receives a claim for an apportionment from a spouse, child, or dependent parent, VA must first determine if the apportionment claimant is a proper claimant. This requires VA to request evidence of the claimed relationship from the VA beneficiary and the apportionment claimant, unless the evidence is already in VA's possession or the dependent is already established on the beneficiary's award. Concurrently, VA must develop for evidence of the financial situation of both the VA beneficiary and the apportionment claimant. Developing for this evidence provides both the VA beneficiary and the apportionment claimant the opportunity to support their claims with financial records and data. In addition, developing for certain evidence provides the VA beneficiary with due process, as he or she has a property interest in the VA compensation benefit. VA requests this information from the beneficiary and the claimant, giving both 65 days to respond. Frequently, the information provided is not complete because either the claimant or the beneficiary does not submit all the requested information. Once financial information development is complete, or the 65-day development period has lapsed, VA then determines if the claimant needs the apportionment and if the beneficiary can afford an apportionment

without undue hardship. As part of the determination of whether the claimant needs the apportionment, VA must determine if the VA beneficiary is currently reasonably contributing to the support of the claimant. If the beneficiary is already reasonably contributing to the support of the claimant, then there is no need to apportion the VA beneficiary's monetary award and the apportionment claim is denied. However, if the VA beneficiary is not reasonably contributing to the claimant's support, then an apportionment is justified if it does not cause undue hardship to the beneficiary. In the cases where an apportionment is justified, VA must determine the amount of apportionment to be taken from the VA beneficiary's award.

To determine the amount of the apportionment, VA first compares the relative economic hardship of an apportionment on the beneficiary with the economic circumstances of the claimant. VA then considers factors such as the amount of compensation or pension the veteran or surviving spouse is paid; the number of dependents who would receive the apportionment; other resources, income, and benefits available to the veteran or surviving spouse and apportionee; and any special needs of the veteran or surviving spouse and apportionee. All of these factors are weighed against the regulatory limit and consistency requirements found in 38 CFR 3.451. This section provides that the amount apportioned "should be generally consistent with the total number of dependents involved." In addition, § 3.451 provides that, ordinarily, an apportionment of more than 50 percent of the veteran's or surviving spouse's compensation or pension would constitute undue hardship, while apportionment of less than 20 percent of the compensation or pension would not provide a reasonable amount for the apportionee.

Once the amount of the apportionment is decided, the apportionment is processed and the beneficiary and apportionee are notified of the decision. Following notification, both the beneficiary and the apportionee have the opportunity to appeal the decision to award an apportionment, the amount of the apportionment, or the effective date of the apportionment.

### State Judicial Systems

When VA's apportionment system is compared to existing state courts, it highlights the inefficiencies of the VA apportionment system and shows why the VA system is redundant and unnecessary in most apportionment cases.

State family courts already provide the same, and arguably better, avenues for claimants as the VA apportionment system. For example, each state's judicial system already has a procedure for determining the allocation of financial resources when a veteran and veteran's spouse are estranged; this is commonly termed "spousal support." In addition, each state's judicial system also has a procedure for determining the allocation of financial resources when a veteran and veteran's child are not living in the same household; this is commonly termed "child support."

We are aware that state courts do not have the authority to order VA to pay compensation directly to dependents. However, state courts can adequately take account of the interrelationship between veterans, their dependents, and VA benefits in other ways. In determining the level or monetary amount of support, the state court will examine the relative financial needs and abilities of the parties to determine the amount of child support or spousal support when the married couple separates or when the child resides with someone other than the veteran or surviving spouse. To do this, the judge or magistrate may compel the

production of financial records which include information concerning the amount of compensation, pension, dependency and indemnity compensation (DIC), or vocational rehabilitation subsistence allowance the veteran or surviving spouse receives from VA. The judge or magistrate makes a decision based on more complete information of the available assets and the needs of the party than is realistically available to VA.

Usually, by the time VA has received the information necessary to determine if an apportionment is appropriate, and if so, how much should be apportioned, the state court system has already determined an allocation of the primary beneficiary's assets and the apportionment claimant's assets. VA's subsequent apportionment determination, often based on less complete evidence than is available to the state court, may disturb the court's asset allocation by taking assets assumed by the state court to be for the benefit of the primary beneficiary and allocating those assets to the apportionment claimant. When this occurs, the parties must either go back to court to re-allocate the assets or appeal VA's apportionment determination. These conflicting systems typically result in inconvenient and unfair results to the primary beneficiary and the apportionment claimant and workload increases for both the state's court system and VA.

Furthermore, 42 U.S.C. 666(f) requires that each state have in effect the Uniform Interstate Family Support Act (UIFSA), which establishes a "one-order" nationwide enforcement model to preclude conflicting orders in multiple jurisdictions. *See Construction and Application of Uniform Interstate Family Support Act*, 90 A.L.R. 5th 1,2. UIFSA, adopted by each state, provides the mechanisms and procedures for modifying state support orders. *See Unif.*

Interstate Fam. Support Act sections 205, 211, 613;

<https://www.acf.hhs.gov/css/parents>.

In comparing state family court support determinations to VA's apportionment system, the state court system provides for a far more accurate and complete determination. State courts already make determinations for the same kinds of claims that the VA apportionment system does, but state courts do so with more consistent and fair results.

Furthermore, a state court's allocation of resources is enforceable across state lines. The Social Security Act, codified in pertinent part at 42 U.S.C. Chapter 7, subchapter IV, sections 651 through 669B, provides for enforcement of another state's child and spousal support payments either through direct levy of the assets held by a financial institution or levy through that state's enforcement organization (Title IV-D agencies, named after subchapter IV-D of the Social Security Act). See also Direct Imposition of Liens and Levies Across State Lines, PIQ-99-06, U.S. Department of Health and Human Service, Administration for Children and Families, Office of Child Support Enforcement, August 16, 1999, <http://www.acf.hhs.gov/programs/css/resource/direct-imposition-of-liens-and-levies-across-state-lines>, last viewed March 2, 2021. Specifically, 42 U.S.C. 666(f) requires all states to adopt the UIFSA. The UIFSA establishes a "one-order" nationwide enforcement model to preclude conflicting orders in multiple jurisdictions. See *Construction and Application of Uniform Interstate Family Support Act*, 90 A.L.R.5th 1, 2.

Although 38 U.S.C. 5301(a)(1) generally exempts VA benefits from any legal or equitable process, such as garnishment, Congress created an exception to section 5301(a) for alimony and child support obligations by enacting the Child Support Enforcement Act under 42 U.S.C. 659. Under section 659, VA disability



compensation payable to a veteran who has waived a portion of his or her military retired pay to receive the VA benefit could be subject to garnishment for alimony or child support obligations. This means that section 659 authorizes VA, pursuant to proper service of a valid state court order, to withhold, or garnish, a portion of a veteran's disability compensation for alimony or child support when a veteran has waived a portion of his or her military retired or retainer pay to receive the VA benefit. Additionally, the United States Supreme Court in *Rose v. Rose*, 481 U.S. 619 (1987), held that state courts may consider the availability of VA benefits in determining the amount of a veteran's child support obligation and, in fact, may set a support award in an amount that would necessarily require that part of the support award be paid out of VA benefits once they have been received by the veteran. See *id.* Further, the majority of courts considering the issue of spousal support have applied *Rose* to hold that "veterans' disability benefits are not exempt from claims for alimony, spousal support and child support." *Case v. Dubaj*, C.A. No. 08-347 Erie, 2011 U.S. Dist. LEXIS 96808 at \*4 (W.D. Pa. Aug. 29, 2011) (citing 52 A.L.R.5th 221 section 28[a] ("With few exceptions, the cases hold that payments arising from service in the Armed Forces..., though exempt as to the claims of ordinary creditors, are not exempt from a claim for alimony, support, or maintenance...").

#### Apportionment Expenditure

As noted previously, many claims for apportionment involve complex issues of family law, and are often very fact-intensive. Due to the complex nature of these claims, they require significant adjudicative processing time. For example, in fiscal year (FY) 2013, the Veterans Benefits Administration completed 6,570 apportionment claims. VA's Automated Standardized

Performance Elements Nationwide (ASPEN) work actions credit shows that it required 13 full-time equivalent (FTE) employees per year to process those claims (6,570 claims times 3.26 hours per claim (per M21-4) divided by 1,645 hours, which VA estimates is the number of available work hours for a full-time employee in one year based on the Office of Personnel Management's total hours of 2,087 for a general schedule employee (5 U.S.C. 5504(b)(1))).

By discontinuing adjudication of most VA apportionment claims, VA would avoid possible conflict with state court determinations and free up existing employees to process other claim actions. By only processing apportionment claims for incarcerated veterans and incompetent veterans hospitalized at government expense, without consideration of financial contributions to the claimant, these proposed rules will reduce the number of FTE needed each year for apportionment claims from 13 to two. The time of the additional 11 FTEs could then be dedicated to processing other claims.

#### Alternatives Considered

##### 1. Maintain the current apportionment provisions unchanged.

VA considered maintaining the current apportionment provisions without change. However, in VA's view, the expertise of state courts undercuts the need for a dual VA apportionment system, and, as discussed above, VA apportionment actions may create unnecessary disruption to the decisions made by state courts. Accordingly, VA believes that a change is needed in the 115-year old apportionment system.

##### 2. Set the apportionment amount to be equal to that additional amount which the veteran receives for the apportionee as a dependent.

If a veteran furnishes VA with evidence showing that he/she has a dependent (spouse, child, or parent) and the veteran is in receipt of compensation at the 30-percent disabled level or above, the veteran may receive additional compensation for their dependents. The additional amount paid for a dependent is in recognition that a veteran with an impaired earning capacity, who also has dependents, needs additional money to make up the difference between what the veteran is earning and what the veteran could earn without the disability and still care for his or her dependents.

By automatically limiting apportionments to the additional amount paid to the veteran because of the existence of a dependent, the veteran would still receive that amount which Congress intended the veteran to have. However, the dependent would receive that additional amount which was intended for the veteran to use for the dependent. For those veterans not in receipt of an additional allowance for dependent(s) (i.e., a veteran rated 0-, 10-, or 20-percent disabled), VA would deny any apportionment claim, as an apportionment would be considered an undue hardship on the veteran. The advantage of this option is that it would make VA apportionments simple and consistent.

With this option, no consideration would be given to support orders that are currently in place in which the veteran or surviving spouse is making regular payments. As a result, it would still be possible for the apportionee to receive both an apportionment from the VA and the payments made as a result of the court order which already considered the benefits provided by VA in determining the amount of that court-ordered payment.

After considering this option, VA determined that this option also has the potential to disturb a state court's allocation of resources and also would require some expenditure of VA assets in processing the apportionment. An apportionee

would generally receive a relatively low amount of benefits, set without regard to an apportionee's actual financial need. This option would still result in the problems presented by the current regulations, namely that VA will duplicate and potentially disturb state court efforts and unnecessarily occupy FTE that could be used to serve other claimants. For these reasons, VA chose not to propose this option.

### 3. Eliminate all apportionments.

VA considered eliminating all apportionments. Despite the advantages, if VA eliminated all apportionments there would be some inequitable results. Specifically, it would have negative consequences in two situations where VA currently pays benefits that are generally outside the scope of state courts. These two situations are incarcerated veterans and veterans institutionalized at government expense.

VA beneficiaries who are incarcerated will have their payment amounts reduced beginning with the 61st day of imprisonment for a felony. Due to imprisonment, the VA beneficiary is often not able to continue to financially care for his or her family. VA currently allows for the family members of an incarcerated beneficiary to apply for an apportionment of the beneficiary's benefit, ensuring that the incarceration does not interfere with continuation of prior financial support. This means that although the incarcerated beneficiary will have his or her payments reduced or terminated while incarcerated, the family could apply to have the benefits paid to them instead. To eliminate this kind of apportionment would hurt the families of incarcerated beneficiaries. In addition, very few work-hours (e.g., two FTE per year) would be saved by not processing

apportionments to an incarcerated veteran's or incarcerated surviving spouse's dependents.

Additionally, if VA eliminated all apportionments, the amount of the benefit not paid to the administrator of the institution caring for an incompetent veteran who is institutionalized at government expense would be unavailable to assist in supporting the institution caring for the veteran or the institutionalized veteran's dependents. Since a fiduciary is appointed in almost all of these situations, the time expended in processing the few remaining claims would be minimal.

After carefully considering all options, VA determined that elimination of all apportionments is not the best option and that apportionment of benefits to the dependents of an incarcerated beneficiary and to an incompetent veteran institutionalized at government expense should be continued, with slight modification. Specifically, VA determined it should remove consideration of financial need for an apportionment of an incarcerated beneficiary's award. In removing the financial need requirement for claims for apportionments of an incarcerated beneficiary's award, VA remains consistent with discontinuing needs-based apportionments for the same reasons set forth above. Additionally, this amendment to apportionments involving incarcerated beneficiaries better aligns with Congressional intent in establishing statutory authority for VA to apportion certain benefits in 38 U.S.C. 5313(b)(1).

These amendments ensure that the veteran's or surviving spouse's benefits are used to support the veteran's or surviving spouse's dependents in those two instances where the state court system does not provide a mechanism to support a veteran's or surviving spouse's beneficiaries.

Form for Requesting an Apportionment

In conjunction with this rulemaking, VA also proposes amendments to current VA Form 21-0788, Information Regarding Apportionment of Beneficiary's Award. In accordance with 38 CFR 3.155, use of this standard form is required for all requests for an apportionment. While apportioned dollars are “derivative benefits” in the sense that they deal with the distribution of money VA already owes to a claimant rather than a separate assertion of entitlement to payment for, e.g., a service-connected disability, apportionment is also a “claim” in the sense that it is an assertion of entitlement to receive funds from the government. Further, 38 CFR 3.400(e) explicitly recognizes apportionment as a “claim.” Accordingly, the claim initiation structure of 38 CFR 3.155 applies to apportionments. VA proposes to amend the current form by removing all sections requesting information that pertain to income, net worth, or financial contributions, as this information will no longer be used to render a decision. VA also proposes to add a section allowing the claimant to identify which status qualifies him/her for an apportionment award. Finally, VA proposes non-substantive amendments to the form with regard to identifying the Veteran, claimant, and beneficiary.

VA believes the proposed amendments to this form will assist beneficiaries in defining what information is necessary for VA to make its decision, improve VA's administrative efficiency in processing requests, and help provide timely decisions to those who request an apportionment of a beneficiary's award.

#### Mechanics of the Amendments

On November 27, 2013, VA published in the Federal Register (78 FR 71042) a proposed regulation titled “VA Compensation and Pension Regulation

Rewrite Project; Proposed Rule.” Among other things, the rule proposed a rewritten and reorganized version of apportionment regulations. VA is using that proposed rule’s reorganizational structure and much of the revised wording of those proposed regulations in this new proposed rule. The wording is changed to reflect the proposed policy to eliminate all need-based apportionments and to retain only apportionments where the primary beneficiary is incarcerated or where an incompetent veteran without a fiduciary is institutionalized at government expense.

#### Section 3.31 Commencement of the period of payment

In 38 CFR 3.31(c)(3), VA proposes removing the words “original or increased” because with this amendment there are only original claims for apportionments. For the reasons discussed above, no increases in current or future apportionments will be allowed under the proposed regulatory change.

#### Section 3.210 Child’s relationship

In 38 CFR 3.210(c)(1)(ii), VA proposes removing the last sentence of the paragraph. This amendment proposes to eliminate apportionment eligibility in the situation of a child adopted out of a veteran’s family, so this reference to apportionment would no longer be correct.

#### Section 3.252 Annual income; pension; Mexican border period and later war periods

In 38 CFR 3.252(d), VA proposes to remove the last sentence of 3.252(d) to reflect the proposed change of the removal of 38 CFR 3.451.

### Section 3.400 General

Section 3.400(e) contains effective date rules for beginning apportionments. In revised § 3.400(e), VA proposes to update this paragraph by stating, in simpler terminology, the rules for effective dates for apportionments. VA intends no substantive changes from the current rules, only to reword the provisions to provide greater detail and clarity. VA proposes removing the terminology referencing original and other than original claims since the proposed rules only provide for original claims. In subparagraph (e)(1), VA proposes to provide the general rule that apportionments are effective the first day of the month after the month in which VA receives an apportionment claim. Subparagraph (e)(2) provides three exceptions to the general rule. Subparagraph (e)(2)(i) proposes to provide that where a primary beneficiary's claim for benefits is pending, the effective date of any apportionment will be either the date of the primary beneficiary's award or the date entitlement arose, whichever is later. In subparagraph (e)(2)(ii), VA proposes to provide that if the apportionment claimant has not yet been established as a primary beneficiary's dependent or as the veteran's dependent, the effective date will be the date of the primary beneficiary's award or the date entitlement arose, whichever is later. In subparagraph (e)(2)(iii), VA proposes to refer to §§ 3.665 or 3.666 for the effective date rules for when the primary beneficiary is incarcerated.

### Sections 3.450 to 3.461

VA proposes to remove and replace 38 CFR 3.450 to 3.461 with revised sections that change the wording of the concepts that it intends to keep for processing apportionments and that eliminate the need-based apportionment provisions. In addition to replacing these sections, VA proposes to renumber the



sections, leaving some regulation paragraph numbers reserved so as to be able to insert additional regulations at a later time, if needed. The renamed and renumbered regulations are as follows:

§ 3.450 General apportionment

§ 3.451 Apportionment claims

§ 3.452 Veteran's benefits apportionable

§ 3.453 Veterans benefits not apportionable

§ 3.454 Apportionment of pension

§ 3.455 Apportionment of a surviving spouse's dependency and indemnity compensation

§§ 3.456 – 3.461 [Reserved]

Section 3.450 is a new regulation, not derived from any current regulation. VA proposes titling this regulation, General apportionment. VA is proposing to include two new provisions and to restate a previous provision concerning submission of an application that was implied, but not specifically stated, in the proposed-to-be-replaced regulations. In the proposed first paragraph, titled (a) Applicability, VA states that these changes to the apportionment provisions are applicable to all claims for apportionment received on or after the effective date of the rule, i.e., 60 days after the date of publication in the Federal Register. In the proposed second paragraph, (b) Existing apportionments, VA states that apportionments being paid as of the effective date of the changes will continue until the circumstances providing entitlement to the apportionment no longer exist. In the third paragraph, (c) Apportionment application, VA states that claims for apportionment must be on a form prescribed by the Secretary.

VA proposes removing current § 3.451. This section contains provisions for determining relative hardship between a primary beneficiary and an

apportionment claimant. Because VA proposes to no longer apportion benefits in this manner, this section would no longer be applicable.

VA proposes titling the new § 3.451, Apportionment claims. In revised § 3.451, VA proposes to state the basic provisions for when a veteran's pension or compensation or a surviving spouse's DIC or pension may be apportioned. Proposed § 3.451 will explain that all or a portion of a pension or disability compensation award may be apportioned if the veteran is incompetent and hospitalized at government expense or is incarcerated and meets any of the conditions of §§ 3.665 or 3.666. Similarly, proposed § 3.451 explains that an award to a surviving spouse may be apportioned if the surviving spouse is incarcerated and meets the conditions of § 3.665 or 3.666. Furthermore, this proposed section will address when a child enters active duty and either claims or is in receipt of an apportionment, how certain death benefits will be apportioned amongst surviving children, and apportionment of death benefits for children not residing with a surviving spouse. While the concepts in this section are generally taken from current §§ 3.450 and 3.452 concerning what benefits may be apportioned, from whom, and to whom, VA proposes to remove those provisions relating to determining apportionments based on the relative need of the beneficiary and apportionment claimant and has rewritten the rest to improve clarity.

VA proposes removing the provisions concerning apportionments from a surviving spouse's compensation. Paragraph (a)(2) of current § 3.450 refers to apportioning the "compensation . . . payable to the surviving spouse." Paragraph (d) of current § 3.450 states, "Any amounts payable for children under §§ 3.459, 3.460, and 3.461 will be equally divided among the children." Given that § 3.459 explicitly governs death compensation, and the reference to

“compensation . . . payable to the surviving spouse” in § 3.450(a)(2) appears in a sentence that separately lists dependency and indemnity compensation, the reference to compensation in current § 3.450(a)(2) and the reference to the current § 3.459 in § 3.450(d) both pertain to the apportionment of death compensation. VA is not referring to compensation payable to a surviving spouse in § 3.451. VA is also not including an equivalent to current § 3.459 or any reference thereto. There are less than 300 beneficiaries currently receiving death compensation. Except for one small group of beneficiaries, death compensation is payable only if the veteran died prior to January 1, 1957. VA has not received a claim for death compensation in more than 10 years and does not expect to receive any claims for apportionment of death compensation. DIC is a much greater benefit than death compensation. Because of the small number of beneficiaries of death compensation and the unlikelihood of a claim for apportionment of such benefits, the provisions concerning apportionment of death compensation do not need to be carried forward.

In revised § 3.451(a), VA proposes retaining from the previous version of § 3.450(a) the provision that all or part of a veteran’s pension or compensation or all or part of a surviving spouse’s DIC may be apportioned to the spouse, child, or dependent parents. VA is also proposing to specify the two situations where VA will, on receipt of an application, apportion a veteran’s or surviving spouse’s benefits.

VA proposes retaining, in revised § 3.451(b), the provision from current § 3.450(b) that no apportionment will be made or changed solely because a child has entered active duty in the Armed Forces. VA proposes incorporating the provisions from current § 3.458(e) into this section to keep similar issues together.

VA proposes removing the provision from § 3.450(c) that no apportionment will be made when the veteran, veteran's spouse (when paid "as wife" or "as husband"), surviving spouse, or fiduciary is providing for the dependents. Under this proposed rule, VA would no longer be basing apportionment determinations on whether the primary VA beneficiary is providing for the dependents.

VA proposes retaining the provision from § 3.450(d) and renumbering it as § 3.451(c), concerning division of apportionments paid to children of the veteran, but rewording the provision for clarity and revising the cross-reference to reference the revised, applicable regulations.

VA proposes revising the provisions from § 3.450(e) and renumbering it as § 3.451(a)(2). VA proposes removing the provision that provides that amounts payable to a surviving spouse for a child may be apportioned if the child or children are not residing with the surviving spouse and the surviving spouse is not reasonably contributing to the child's support. For reasons previously stated, state court processes are best suited to assess and address the surviving spouse's support obligations in such situations.

VA proposes removing current § 3.450(f) and not including it in these revised regulations. This section is redundant of provisions already found in the entirety of § 3.250 and does not need to be repeated.

VA proposes also removing the provisions of current § 3.450(g), which provide for apportionment of death pension by reference, because this section is no longer needed. VA is removing all the death pension provisions for the reasons stated earlier.

VA proposes renaming current § 3.452 from "Situations when benefits may be apportioned" to "Veteran's benefits apportionable." VA proposes

rewording some of the provisions for clarity, removing paragraphs (a) and (d), and re-designating the remaining paragraphs. Current paragraph (a) provides for apportionment when the veteran is not residing with the spouse and children, or not residing with his or her children. Under this proposed rule, the only two situations where VA would apportion benefits are when the primary beneficiary is incarcerated or when an incompetent veteran without a fiduciary is institutionalized at government expense. Therefore, this paragraph would no longer be necessary. Section 3.452(d) concerns apportionments to a dependent parent or parents when the veteran does not contribute to the support of the dependent parent or parents. As discussed above, VA proposes no longer apportioning benefits in situations requiring a need-based determination, so this paragraph is also proposed to be removed.

In § 3.452(a), formerly § 3.452(b), VA proposes restating without change that apportionment may be made pending appointment of a guardian or fiduciary.

In § 3.452(b), formerly § 3.452(c), VA has rewritten the proposed provisions for clarity, but retained the principles of the previous provisions concerning apportionments when a veteran is receiving hospital, domiciliary, or nursing home care, and added a provision that if a veteran's dependent parents are the only relations eligible for the apportionment, the parent or parents may receive the apportionment. These provisions are derived from § 3.454, which would be replaced.

VA proposes removing current § 3.453. This section referred the user to the previous § 3.451, which is also proposed to be removed. VA proposes replacing § 3.453 with a new § 3.453 titled, "Veterans benefits not apportionable." The provisions in the proposed § 3.453 are derived from current § 3.458. In paragraph (a) VA proposes stating that no apportionment will be made unless an

application for an apportionment is received by VA. In § 3.453(c), VA has included a cross reference to the provisions on forfeiture for fraud (§ 3.901), treasonable acts (§ 3.902), and subversive activity (§ 3.903). Those regulations contain the complete rules on forfeiture and apportionments when benefits have been forfeited. In § 3.453(b) VA proposes combining the provisions contained in current §§ 3.458(f)(1), 3.901, and 3.902. Current § 3.458(f)(1) prohibits an apportionment for forfeitures declared before September 2, 1959, if a veteran's dependent "is determined by [VA] to have been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or its allies." Current §§ 3.901 (forfeiture for fraud) and 3.902 (forfeiture for treason), both permit apportionments to a beneficiary's dependents under certain circumstances if the forfeiture was declared prior to September 2, 1959, but prohibit an apportionment to any dependent who themselves was guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or its allies. Accordingly, proposed § 3.453(b) states that benefits will not be apportioned to any beneficiary's dependent who is determined by VA to have been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the United States or its allies. In paragraph (c), VA proposes providing that after September 1, 1959, no apportionment will be made for any dependent of a veteran or surviving spouse where benefits were forfeited due to fraud or a treasonable act, or where there was a conviction for subversive activity after September 1, 1959.

VA proposes replacing § 3.454 with a new section titled, "Apportionment of pension." The provisions of this section are derived from the current § 3.454. Current § 3.454(a) specifies that if an incompetent veteran is receiving care in a government institution and is entitled to pension, VA will pay \$25 per month as an institutional award and pay the balance of the pension to the veteran's spouse

or child or, if the veteran has no spouse or child but has a dependent parent, apportion pension to the dependent parent as a special apportionment. VA has not included this specific information in proposed § 3.454 because it is outdated. To the extent that it provides that the balance of pension will be apportioned to a veteran's spouse or child, it is inconsistent with the approach VA would adopt through these proposed rules since it is based on a determination of hardship. VA is eliminating the hardship-based apportionments, so this provision is no longer needed. Because the amount of the institutional award is not fixed by regulation, VA determines the amount of the apportionment on a case-by-case basis.

Finally, VA does not apportion a veteran's pension to a dependent parent. A parent may not be a dependent for disability pension. Whereas a veteran receiving disability compensation may receive an additional allowance for dependent parents, Congress authorizes an increased maximum annual pension rate only for a spouse or child, not for a dependent parent. See 38 U.S.C. 1542.

VA would also not include § 3.454(b)(2). To the extent that § 3.454(b)(2) is based on a reduction under current § 3.551(d) (reducing Improved Pension for veterans receiving care before February 1, 1990), it is unnecessary. To the extent that § 3.454(b)(2) is purportedly based on a reduction under § 3.551(e), it is obsolete. VA no longer reduces Improved Pension to \$60 under current § 3.551(e). The \$60 amount was increased to \$90, effective February 1, 1990, by Public Law 101-237, section 111, 103 Stat. 2062, 2064-65 (1989). VA proposes that § 3.454, in paragraph (a), would provide that a veteran's disability pension will be apportioned to the veteran's spouse, child or children, or dependent parents. In paragraph (b), VA proposes providing for payment of an

apportionment for the three types of death pension: Old Law Death Pension, Section 306 Death Pension, and Improved Death Pension. These types of death pension may be apportioned to the veteran's child or children.

VA proposes adding § 3.455, "Apportionment of a surviving spouse's dependency and indemnity compensation." The provisions in this section are derived from current § 3.461 but have been rewritten for clarity. In paragraph (a), VA proposes providing that the surviving spouse's DIC will only be apportioned if the surviving spouse is incarcerated and will only be apportioned for a child or children under 18 years of age, unless the child or children became permanently incapable of self-support before reaching the age of 18 years.

In paragraph (b), VA proposes referring to § 3.665 to determine the amount of DIC which may be apportioned.

VA proposes removing and reserving §§ 3.458 – 3.461 because these provisions are either not being carried forward after this proposed change or the provisions for those sections have been incorporated into other sections.

Current § 3.458 provides situations in which a veteran's benefits will not be apportioned by VA, to include provisions concerning not apportioning benefits where each of the apportionees would not receive a reasonable amount, where the spouse of the veteran had been found guilty of conjugal infidelity, where the spouse of the veteran lived with or held himself or herself out to be the spouse of another, and where the child of a veteran had been adopted, except for the additional amount the veteran was paid for the child.

Current § 3.458 also includes a provision concerning apportionment when a child enters active duty, which is included in proposed § 3.451(b). Additionally, the provision concerning the prohibition of paying an apportionment to a claimant where the apportionment claimant was guilty of mutiny, treason, sabotage, or



rendering assistance to an enemy of the United States or its allies has been included in proposed § 3.453. Current § 3.458 also includes the provision requiring a formal claim for apportionment before any apportionment may be paid, and this provision is included in proposed § 3.450(c).

Current § 3.459 provides for apportionment of death compensation. As explained above, VA proposes not carrying the provisions for death compensation forward because there are fewer than 300 beneficiaries and it does not anticipate receiving any more claims for this benefit.

Current § 3.460 provides for apportionment of death pension. VA proposes to incorporate these provisions into § 3.454.

Current § 3.461 provides for apportionment of DIC. These provisions are proposed to be incorporated into § 3.455.

#### Section 3.556 Adjustment on discharge or release.

In 38 CFR 3.556(a)(1), VA proposes removing the phrase at the end of the second sentence, “unless it is determined that apportionment for a spouse should be continued.” VA proposes to no longer apportion the veteran’s benefits if the veteran is released from the hospital because the full amount of the benefit will be paid to the veteran. Once the veteran is released from the hospital, apportionments would only be made if the veteran is readmitted to the hospital or is incarcerated. Need-based apportionments would no longer be adjudicated.

In § 3.556(e), VA proposes amending the sentence providing for the possible continuation of an apportionment when the veteran is discharged from the hospital. VA proposes no longer apportioning the veteran’s benefits if the veteran is released from the hospital because the full amount of the benefit will be paid to the veteran. Once the veteran is released from the hospital,

apportionments would only be made if the veteran is readmitted to the hospital or is incarcerated. Need-based apportionments would no longer be adjudicated.

VA also proposes to amend the third sentence to remove the reference to a competent veteran and delete the fourth sentence of paragraph (e) as these refer to obsolete provisions of former 38 CFR 3.551(b) (as in effect prior to December 27, 2001). See 38 CFR 3.558(b). Finally, VA proposes to delete the reference to adjustments in the second-to-last sentence of paragraph (e) as this proposed rule would eliminate any adjustments.

#### Section 3.665 Incarcerated beneficiaries and fugitive felons – compensation.

In § 3.665(e)(1), VA proposes to remove the last part of the first sentence and to strike the remainder of the paragraph so the paragraph reads, “Compensation. All of the compensation not paid to an incarcerated veteran may be apportioned to the veteran’s surviving spouse, child or children (in equal shares), or dependent parent or parents (in equal shares).” This will remove the requirement that the person in this situation requesting an apportionment demonstrate a need for the funds. In subparagraph (2), VA proposes amending the subparagraph to remove the wording that restricts the amount of apportionment that may be made based on the need of the surviving spouse or the veteran’s child or children.

In paragraph (h), VA proposes to remove the last sentence which provides for an apportionee to reapply for apportionment when the primary beneficiary is released from incarceration. VA would no longer apportion benefits in these situations. Similarly, in paragraph (i)(1) and (2), VA is proposing to remove the language which implies that apportionment may be continued in some situations where the primary beneficiary is released from incarceration. VA would no

longer apportion benefits in these situations because the full amount of the benefit will be paid to the primary beneficiary. Once the veteran is released from incarceration, apportionments would only be made if the veteran is again incarcerated. Need-based apportionments will no longer be adjudicated.

#### Section 21.330 Apportionment.

Section 21.330 concerns the apportionment of a veteran's vocational rehabilitation subsistence allowance. This section provides that an apportionment will, if in order, be made in accordance with the provisions of part 3. Consistent with 38 U.S.C. 5307 and current regulations, apportionment of a veteran's vocational rehabilitation subsistence allowance is not authorized if a veteran is incarcerated and participating in a vocational rehabilitation program during incarceration. Because there are no longer any circumstances where a veteran's vocational rehabilitation subsistence allowance would be apportioned, VA is removing this entire section.

VA proposes removing § 21.330 and reserving the paragraph number. VA proposes to stop apportioning vocational rehabilitation subsistence allowances for the same reasons given above. Because VA is proposing to discontinue all apportionments except in situations specified in 38 U.S.C. 5307(a)(1) and 5313(b), VA is also proposing to discontinue apportionment of the vocational rehabilitation subsistence allowance. The current regulation prohibits apportioning the subsistence allowance when a veteran has been convicted of a felony and is incarcerated. Because VA is proposing to discontinue all vocational rehabilitation subsistence allowance apportionments, there will not be any exceptions.

### Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is not a significant regulatory action under Executive Order 12866.

The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at [www.regulations.gov](http://www.regulations.gov).

### Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601-612). Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply. The certification is based on the fact that no small entities or businesses determine entitlement to VA apportionment payments.”

### Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more

(adjusted annually for inflation) in any one year. This proposed rule will have no such effect on State, local, and tribal governments, or on the private sector.

#### Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. See also 5 CFR 1320.8(b)(3)(vi).

As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA has submitted these information collection amendments to OMB for its review. Notice of OMB approval for this information collection will be published in a future Federal Register document. This rule will impose the following amended information collection requirements:

#### Description of respondents:

The respondent population is composed of individuals who are requesting an apportionment of a beneficiary's award amount when that beneficiary is incarcerated or is deemed incompetent and hospitalized at government expense.

#### Estimated frequency of responses:

Most claimants will use this form one time. However, the frequency may vary slightly for apportionees of incarcerated veterans dependent on the number of times the primary beneficiary is incarcerated. For a veteran that is incompetent and institutionalized at government expense, a fiduciary will be

appointed. Therefore, apportionment claims other than the initial claim will not be needed.

Estimated number of respondents:

VA anticipates the annual estimated numbers of respondents for 2900-0666 (VA Form 21-0788) as follows:

2900-0666 (VA Form 21-0788)—In FY 2014, VA processed just over 800 hospital adjustments for veterans in receipt of benefits that were hospitalized or in a nursing home or in receipt of domiciliary care at VA expense, or whose payment rates were adjusted based on such care. Fewer than 800 of these veterans were incompetent and met the requirements for payment of an apportionment to a dependent. VA also completed 15 apportionments for incarcerated veterans. The approximately 815 claims completed each year is considerably fewer than was estimated in 2005 when VA Form 21-0788 was first approved, as published in the Federal Register, 70 FR 39866 on July 11, 2005. At that time it was estimated that VA would receive approximately 25,000 apportionment claims per year.

OMB Control Number 2900-0666 (VA Form 21-0788) is a collection of information for a particular apportionment of a benefit which is currently required by VA in order for these claims to be processed and adjudicated. Since VA requires these forms to be submitted when filing for an apportionment of a particular benefit, VA does not expect an increase in the annual number of respondents; VA anticipates a decrease in the number of claims. In addition, VA is reducing the substance of the collection of information on this OMB-approved collection of information and is not increasing the respondent burden.

#### Estimated total annual reporting and recordkeeping burden:

2900-0666 (VA Form 21-0788)—The annual burden is reduced from approximately 12,500 hours per year (25,000 claims at 30 minutes per claim form) to about 203 hours per year (815 claims per year at 15 minutes per claim form). The total estimated cost to respondents is reduced to \$4,843.58 (203 hours x \$23.86/hour). This submission does not involve any recordkeeping costs.

This rulemaking is proposing to mandate the use of the VA form in the processing and adjudication of apportionment claims. The proposed amendment to § 3.450 affects the estimated annual number of respondents and consequently, the estimated total annual reporting and recordkeeping burden, and reduces the effect of the existing collection of information that has already been approved by OMB. The proposed use of information and description of likely respondents will remain unchanged for this form. The frequency of responses is less than the previous number estimated. The estimated average burden per response is reduced from 30 minutes per response to 15 minutes per response. VA estimates the total incremental savings based on this revised information collection to be \$293,656.42 (\$298,500 under the current form - \$4,834.58 for the revised form).

#### Methodology for Estimated Annual Number of Respondents for Affected Forms

VA has formulated the estimated total number of annual responses for apportionment claims by using the total number of apportionment claims completed in FY 2014.

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.102, Compensation for Service-Connected Deaths for Veterans' Dependents; 64.104, Pension for Non-Service-Connected Disability for Veterans; 64.105, Pension to Veterans Surviving Spouses, and Children; 64.109, Veterans Compensation for Service-Connected Disability; 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Catalog of Federal Domestic Assistance for 38 CFR Part 21

The Catalog of Federal Domestic Assistance numbers and titles for the programs that will be affected by this proposed rule are 64.116, Vocational Rehabilitation for Disabled Veterans, and 64.128, Vocational Training and Rehabilitation for Vietnam Veterans' Children with Spina Bifida or Other Covered Defects.



### List of Subjects in 38 CFR Part 3

Administrative practice and procedure, Claims, Disability benefits, Pensions, Veterans.

### List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Claims, Veterans, Vocational education, Vocational rehabilitation.

### Signing Authority:

Denis McDonough, Secretary of Veterans Affairs, approved this document on September 30, 2021, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

**Jeffrey M. Martin,**

*Assistant Director,*

*Office of Regulation Policy & Management,*

*Office of the Secretary,*

*Department of Veterans Affairs.*

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR parts 3 and 21 as follows:

### **PART 3 – ADJUDICATION**

## **Subpart A – Pension, Compensation, and Dependency and Indemnity**

### **Compensation**

1. The authority citation for part 3, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), unless otherwise noted.

#### **§ 3.31 [Amended]**

2. Amend § 3.31(c)(3) introductory text by removing the words “original or increased”.

#### **§ 3.210 [Amended]**

3. Amend § 3.210(c)(1)(ii) by:

- a. Removing the word “apportionee,” from the first sentence; and
- b. Removing the last sentence.

#### **§ 3.252 [Amended]**

4. Amend § 3.252 by removing the last sentence of paragraph (d).

5. Revise § 3.400(e) to read as follows:

### **§ 3.400 General.**

\* \* \* \* \*

(e) Apportionment. (§§ 3.450 – 3.455, 3.551). (1) General rule. Except as provided in paragraph (2) of this section, the effective date of an apportionment is the first day of the month after the month in which VA receives an apportionment claim.

(2) Exceptions to general rule—(i) Claim for benefits is pending. If a veteran or surviving spouse (primary beneficiary) has a claim for benefits pending on the date that VA receives an apportionment claim, the effective date of the apportionment will be the effective date of the primary beneficiary’s award, or the date the apportionment claimant’s entitlement arose, whichever is later.

(ii) Apportionment claimant not yet established as the beneficiary's dependent. If VA receives an apportionment claim within 1 year of the award of benefits to the primary beneficiary and the apportionment claimant has not been established as a dependent on the primary beneficiary's award, the effective date of the apportionment will be the effective date of the primary beneficiary's award, or the date the apportionment claimant's entitlement arose, whichever is later.

(iii) The primary beneficiary is incarcerated. The effective date of an apportionment when the primary beneficiary is incarcerated is specified in § 3.665 or 3.666.

\* \* \* \* \*

6. Revise § 3.450 to read as follows:

**§ 3.450 General apportionment.**

(a) Applicability. Sections 3.450 through 3.459 apply to all claims for apportionment VA receives on or after [EFFECTIVE DATE OF THE FINAL RULE].

(b) Existing apportionments. All apportionments being paid as of [EFFECTIVE DATE OF THE FINAL RULE] will continue to be paid until the circumstances which provided entitlement to the apportionment no longer exist, such as divorce of the veteran and spouse, death of the primary beneficiary, death of an apportionee, or other such circumstances which provided entitlement to the apportionment.

(c) Apportionment application. Claims for apportionment must be submitted to VA on a form prescribed by the Secretary.

(Authority: 38 U.S.C. 501(a))

7. Revise § 3.451 to read as follows:

**§ 3.451 Apportionment claims.**

(a) General—(1) Veteran. All or part of the pension or disability compensation payable to any veteran may be apportioned if one of the following conditions exist:

(i) For his or her spouse, child, or dependent parents if the veteran is incompetent and is being furnished hospital treatment, nursing home, or domiciliary care by the U.S., or any political subdivision thereof.

(ii) The veteran is incarcerated and meets the conditions of § 3.665 or 3.666.

(2) Surviving spouse. Where a child or children of a deceased veteran is not living with the veteran's surviving spouse because the surviving spouse is incarcerated and meets the conditions of § 3.665 or 3.666, the dependency and indemnity compensation (DIC) or pension otherwise payable to the surviving spouse may be apportioned to the child or children. No apportionment shall be payable to a child who did not reside with the surviving spouse prior to incarceration.

(b) Apportionment to a child on active duty. No apportionment of disability or death benefits will be made or changed solely because a child has entered active duty. If an apportionment is claimed for a child on active duty on the date the apportionment claim is received by VA, no apportionment will be made. If an apportionment is being paid to the veteran's spouse and includes an amount for a child, and the child enters active duty, no change in the apportionment will be made.

(c) Apportionment of death benefits. Any amounts payable for children under §§ 3.456, Eligibility for apportionment of pension, and 3.458, Eligibility for

apportionment of a surviving spouse's dependency and indemnity compensation, will be equally divided among the children.

(Authority: 38 U.S.C. 5307, 5502(d))

8. Revise § 3.452 to read as follows:

**§ 3.452 Veteran's benefits apportionable.**

A veteran's benefits may be apportioned when the veteran is receiving hospital treatment, nursing home, or domiciliary care provided by the U.S. or a political subdivision, upon receipt by VA of an application:

(a) Pending appointment of fiduciary. Pending the appointment of a guardian or other fiduciary.

(b) Veteran receiving hospital, domiciliary, or nursing home care—(1) Incompetent veteran—(i) Spouse or child. Where an incompetent veteran without a fiduciary is receiving hospital treatment, nursing home, or domiciliary care provided by the U.S. or a political subdivision, his or her benefit may be apportioned for a spouse or child.

(ii) Dependent parent. Where an incompetent veteran without a fiduciary is receiving hospital treatment, nursing home, or domiciliary care provided by the U.S. or a political subdivision, his or her disability compensation may be apportioned for a dependent parent.

(2) Competent veteran—(i) Section 306 Pension. Where the amount of Section 306 Pension payable to a married veteran is reduced to \$50 monthly under § 3.551, Reduction because of hospitalization, while a veteran is receiving hospital, domiciliary, or nursing home care, an apportionment may be made to such veteran's spouse. The amount of the apportionment generally will be the

difference between \$50 and the total amount of pension payable on December 31, 1978.

(ii) Improved Pension. Where the amount of Improved Pension payable to a married veteran under 38 U.S.C. 1521(b) is reduced to \$90 monthly under § 3.551, Reduction because of hospitalization, an apportionment may be made to such veteran's spouse. The amount of the apportionment generally will be the difference between \$90 and the rate payable if pension were being paid under 38 U.S.C. 1521(c), including the additional amount payable under 38 U.S.C. 1521(e) if the veteran is so entitled.

(Authority: 38 U.S.C. 501(a), 5307, 5502, 5503(a); Pub. L. 95-588, section 306, 92 Stat. 2497)

9. Revise § 3.453 to read as follows:

**§ 3.453 Benefits not apportionable.**

VA will not apportion benefits:

(a) Unless the spouse of a veteran files a claim for an apportionment. If there is a child of the veteran, an apportionment will not be authorized unless a claim for an apportionment is filed by or for the child.

(b) To any beneficiary's dependent who is determined by VA to have been guilty of mutiny, treason, sabotage, or rendering assistance to an enemy of the U.S. or its allies.

(c) After September 1, 1959, if a veteran, spouse, child, or dependent parent: or other primary beneficiary:

(1) Forfeited benefits due to fraud or a treasonable act; or

(2) Was convicted of subversive activity.

CROSS REFERENCE: §§ 3.900, General, 3.901, Fraud, 3.902, Treasonable acts, and 3.903, Subversive activity.

(Authority: 38 U.S.C. 5307, 6103(b), 6104(c), 6105(a))

10. Revise § 3.454 to read as follows:

**§ 3.454 Apportionment of pension.**

(a) Disability pension. Disability pension will be apportioned to the veteran's spouse, or child or children, or dependent parents.

(b) Death pension. Old-Law Death Pension, Section 306 Death Pension and Improved Pension will be apportioned to the veteran's child or children.

(Authority: 38 U.S.C. 5307)

11. Add § 3.455 to read as follows:

**§ 3.455 Apportionment of a surviving spouse's dependency and indemnity compensation.**

(a) Conditions under which apportionment may be made. The surviving spouse's award of dependency and indemnity compensation (DIC) will be apportioned where there is a child under 18 years of age and the surviving spouse is incarcerated and meets the provisions of § 3.665. DIC will not be apportioned under this paragraph (a) for a child over age 18 years unless the child is permanently incapable of self-support in accordance with the provisions of § 3.57.

(b) Rates payable. The amount of apportionment of DIC will be determined in accordance with the provisions of § 3.665.

(Authority: 101(4)(A), 104(a), 5307)

**§§ 3.456 and 3.457 [Added and Reserved]**

12. Add and reserve §§ 3.456 and 3.457.

§ 3.456 Reserved.

§ 3.457 Reserved.

**§§ 3.458 through 3.461 [Removed and Reserved]**

13. Remove and reserve §§ 3.458 through 3.461.

**§§ 3.458 – 3.461 [Reserved]**

14. Amend § 3.556 as follows:

a. In paragraph (a)(1), remove the words “unless it is determined that apportionment for a spouse should be continued”; and

b. In paragraph (e):

1. Remove the words “in the case of a competent veteran” from the second sentence, and remove the third sentence; and

2. Revise the fifth sentence.

The revision reads as follows:

**§ 3.556 Adjustment on discharge or release.**

\* \* \* \* \*

(e) Regular discharge. \* \* \* Where an apportionment was made under §3.551(c), the apportionment will be discontinued effective the day preceding the date of the veteran's release from the hospital, unless an overpayment would result. In the excepted cases, the awards to the veteran and apportionee will be adjusted as of date of last payment. \* \* \*

(Authority: 38 U.S.C. 5503)

\* \* \* \* \*

15. Amend § 3.665 by revising paragraphs (e), (h) and (i) to read as follows:

**§ 3.665 Incarcerated beneficiaries and fugitive felons—compensation.**



\* \* \* \* \*

(e) Apportionment—(1) Compensation. All of the compensation not paid to an incarcerated veteran may be apportioned to the veteran's spouse, child or children (in equal shares), or dependent parent or parents (in equal shares).

(2) DIC. All of the DIC not paid to an incarcerated surviving spouse or other children not in the surviving spouse's custody may be apportioned to another child or children. All of the DIC not paid to an incarcerated child may be apportioned to the surviving spouse or other children (in equal shares).

\* \* \* \* \*

(h) Notice to dependent for whom apportionment granted. A dependent for whom an apportionment is granted under this section shall be informed that the apportionment is subject to immediate discontinuance upon the incarcerated person's release or participation in a work release or halfway house program.

(i) Resumption upon release—(1) No apportionment. If there was no apportionment at the time of release from incarceration, the released person's award shall be resumed the date of release from incarceration if the Department of Veterans Affairs receives notice of release within 1 year following release; otherwise the award shall be resumed the date of receipt of notice of release. If there was an apportionment award during incarceration, it shall be discontinued date of last payment to the apportionee upon receipt of notice of release of the incarcerated person. Payment to the released person shall then be resumed at the full rate from date of last payment to the apportionee. Payment to the released person from date of release to date of last payment to the apportionee shall be made at the rate which is the difference between the released person's full rate and the sum of:

(i) The rate that was payable to the apportionee; and

(ii) The rate payable during incarceration.

(2) Apportionment to a dependent parent. An apportionment made to a dependent parent under this section cannot be continued beyond the veteran's release from incarceration unless the veteran is incompetent and the provisions of §3.452(b)(1) are for application. When a competent veteran is released from incarceration, an apportionment made to a dependent parent shall be discontinued and the veteran's award resumed as provided in paragraph (i)(1) of this section.

\* \* \* \* \*

(Authority: 38 U.S.C. 501(a), 5313, 5313B; Sec. 506, Pub. L. 107-103, 115 Stat. 996-997)

## **PART 21 – VOCATIONAL REHABILITATION AND EDUCATION**

### **Subpart A – Vocational Rehabilitation and Employment Under 38 U.S.C.**

#### **Chapter 31**

16. The authority citation for part 21, subpart A continues to read as follows:

Authority: 38 U.S.C. 501(a), chs. 18, 31, and as noted in specific sections.

#### **§ 21.330 [Removed and Reserved]**

17. Remove and reserve § 21.330.

§ 21.330 [Reserved]